90-1842

NO. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

MEREDITH PENN,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

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QUESTIONS PRESENTED

1. Does the sixth amendment right to a public trial extend to exigent courtroom closures of a kind traditionally available to a trial judge to maintain order?

2. May a harmless error analysis be applied where closure of the courtroom during trial for the testimony of one threatened witness clearly did not impair the integrity of the trial mechanism?

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Petitioner

v.

MEREDITH PENN,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

Petitioner, the Commonwealth of Pennsylvania, respectfully requests that a writ of certiorari issue to review the final judgment and Opinion of the Superior Court of Pennsylvania, which is the highest state court to render a decision on the merits of this case.

The Pennsylvania Superior Court entered its decision on July 7, 1989. Petitioner filed a timely request for

reconsideration or reargument, which was denied on August 31, 1989 (Appendix B at 1B). Petitioner then timely applied to the Pennsylvania Supreme Court for discretionary state court review. This application was denied on February 25, 1991 (Appendix A at 1A). The writ of certiorari, if allowed, is therefore appropriately directed to the intermediate state appellate court. See, e.g., Pennsylvania v. Finley, 481 U.S. 551 (1987).

OPINIONS BELOW

The Opinion and judgment of the Superior Court of Pennsylvania, which is officially reported at 386 Pa. Super. 133, 562 A.2d 833 (1989), is set forth in Appendix C at 1C-30C. The unreported opinion of the trial court, the Court of Common Pleas of Philadelphia, which was filed on June 29, 1988, is set forth in Appendix D at 1D-21D.

STATEMENT OF JURISDICTION

The judgment of the Superior Court of Pennsylvania was entered on July 7, 1989. The Pennsylvania Supreme Court, by Order entered February 25, 1991, declined to exercise authority in the case.

The jurisdiction of this Court to review the judgment of the Superior Court of Pennsylvania is invoked pursuant to 28 U.S.C. § 1257(a).[1]

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[1]The judgment on which review is sought was entered by a three-judge panel of the Pennsylvania Superior Court. Pursuant to this Court's decision in Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 99-100 (1962), the judgment of a panel or division of the appropriate appellate court is reviewable on certiorari if that was the highest state court in which a decision could be had. Cases are heard before the Superior Court en banc or by a panel "as determined by the court in its discretion." Pa. R. App. P. 3721; 42 Pa. Cons. Stat. Ann. (Purdon 1990). As the state supreme court declined discretionary review, the Superior Court panel is the highest state court in which a decision on the federal question could be had. American Ry. Express v. Levee, 263 U.S. 19 (1923); Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 678 n.1 (1968).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment Six, which provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a ... public trial....

United States Constitution, Amendment Fourteen, which provides, in pertinent part:

> [N]o state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent was convicted of murder in the first degree after shooting his common-law wife in the temple at point-blank range. He was granted a new trial because the trial judge had cleared the courtroom

of spectators for the testimony of one witness who had been threatened and was afraid to testify in public.

August 4, 1984 was the birthday of Tina Davis, respondent's estranged common-law wife. That afternoon, respondent was seen with the victim, urging her to resume their relationship. Later that evening, two witnesses saw Ms. Davis and a man dressed similarly to respondent arguing in a brown Ford car. There was a gunshot, and police arrived to find Ms. Davis lying in the street. She had been shot in the left temple at a range of approximately one inch. Later, the brown Ford that respondent regularly drove was found with blood on the front seat (N.T. 9/9/86, 85-109).

At approximately 8:30 p.m. on the day of the shooting, respondent appeared at the home of his friend, Theodore Reed. Respondent, who seemed agitated, announced, "Ted, I just shot Tina." When Reed exclaimed

that he must be joking, respondent replied, "No, I'm serious. I just blew her brains out." There was a speck of blood on respondent's face. He told Reed that he and Tina had been arguing, that things "got out of hand," and that he had reached for his gun and shot her "point blank." Respondent remonstrated, "... you know what I've been going through ... I caught her with that guy." After making this damning admission, respondent then told Reed that "I can't do any time" for the crime he had committed (N.T. 9/10/86, 96-106).

Respondent was tried by a jury for murder and related offenses before the Honorable Paul Ribner in the Philadelphia Court of Common Pleas. On September 10, 1986, Mr. Reed was called to testify at trial. He was present during the morning session, but disappeared before lunch (N.T. 9/10/86, 71). The court issued a bench warrant, but Mr. Reed returned voluntarily

that afternoon and explained he had fled because he was frightened. The facts concerning Mr. Reed's intimidation, which were in no way disputed by defense counsel, were related to Judge Ribner by the assistant district attorney:

> [ASSISTANT DISTRICT ATTORNEY]: He [Reed] was at his residence at Broad and Tioga at two a.m. when some windows in his house were broken. That culminated a period of time, over which he had received a number of phone calls, threatening both him and his four children in the event he testified in this trial against Meredith Penn.
>
> He cannot identify the makers of those phone calls, but he received them on numerous occasions.
>
> He was accosted outside in the hall today by people who he either will not or cannot identify and was requested to change his potential testimony this afternoon.
>
> All of that intimidated him and he left here at about 10:30 or so and called a fellow security guard at Lasalle College to see if he -- if that person could recommend a lawyer for him to talk to before he came here this afternoon.
>
> As I say, he walked in voluntarily at 12:50 and explained all this to me.

He told me that he was perfectly willing to testify, but that he was very intimidated about testifying in front of a full courtroom.

I told him that I would make an application before your honor to have the courtroom cleared, when he testified.

THE COURT: All right. Also, did you notify the Philadelphia Police Department right now that a witness has been threatened and ask them to have his home watched by police officers?

[ASSISTANT DISTRICT ATTORNEY]: I already have, Your Honor.

THE COURT: Notified the Police Department?

[ASSISTANT DISTRICT ATTORNEY]: Detective Dougherty gave him a number where he could be reached 24 hours a day and I gave him one where I could be reached 24 hours a day.

I assured him I would call the district where he lived and have the sector car make more frequent trips by his house and if at some point he desires to have the people arrested who either suborn [sic] perjury or intimated [sic] him, we will be happy to do that, but that would require time to do that at some future time.

N.T. 9/10/86, 88-91 (emphasis supplied).

Defense counsel did not question these facts, but suggested that Mr. Reed should walk into the crowd and publicly point out

those persons whom he could identify as having threatened him, so that they could be arrested in his presence (N.T. 9/10/86, 92-93). However, there was no means by which Mr. Reed could identify those who had made anonymous threats or who were not present at the moment. The court ordered spectators cleared for Mr. Reed's testimony, but simultaneously gave defense counsel the option to designate particular persons he wished to remain. Defense counsel, however, did not respond to this invitation (N.T. 9/19/86, 94).

Respondent subsequently took the stand and testified at trial. He admitted shooting the victim, but claimed it had been accidental (N.T. 9/10/86, 168-217).

The jury convicted respondent of murder in the first degree[2] and possession

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[2] 18 Pa. Cons. Stat. Ann. § 2502(a) (Purdon 1990).

of an instrument of crime,[3] and he was sentenced to life imprisonment. On direct appeal to the Pennsylvania Superior Court, respondent raised numerous claims, including the assertion that he had been denied a public trial under the sixth amendment. The Superior Court decided the case solely on the sixth amendment issue, holding that any similar claim under the state constitution had been waived (Appendix C at 6C).

The appellate court wrote at length on the serious nature of witness intimidation and the difficulties involved in protecting witnesses. It held, however, that the trial court had not adhered to the requirements of Waller v. Georgia, 467 U.S. 39 (1984), and that the sixth amendment had therefore been violated. The court made clear its understanding of the public trial right under Waller: that if a witness

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[3] 18 Pa. Cons. Stat. Ann. § 907 (Purdon 1990).

could not be protected without prejudicing the accused by excluding spectators, a mistrial would be the "steep but unavoidable price" that must be paid. 386 Pa. Super. at 146 n.4, 562 A.2d at 839 n.4; Appendix C at 26C-27C. Accordingly, the court granted a new trial.

Waller v. Georgia does not fully address concerns unique to the sixth, as opposed to the first, amendment. Measures traditionally available to the trial court to maintain order and ensure a fair trial are not restricted by the sixth amendment. Petitioner therefore requests that this Court revisit this important constitutional provision.

REASONS FOR GRANTING THE WRIT

THE SIXTH AMENDMENT PUBLIC TRIAL CLAUSE DOES NOT BAR MEASURES TRADITIONALLY AVAILABLE TO A TRIAL JUDGE TO MAINTAIN ORDER AND AVOID COURTROOM INTIMIDATION AND DISRUPTION. THIS COURT HAS DECIDED ONLY ONE PUBLIC TRIAL CLAUSE CASE IN ITS HISTORY, WALLER V. GEORGIA, AND THAT OPINION DOES NOT ADDRESS THE KIND OF BRIEF CLEARING EMPLOYED HERE, OR RESOLVE THE QUESTION OF HARMLESS ERROR IN SUCH SITUATIONS.

In the two hundred years since the Bill of Rights was ratified, this Court has only once explicitly addressed the right to a public trial under the sixth amendment. That case, Waller v. Georgia, concerned the closing of the courtroom to maintain confidentiality, and accordingly borrows heavily from this Court's first amendment media access cases. But Waller does not discuss the sort of temporary removal of spectators long used for the purpose of keeping disruption or improper influence out of the

courtroom.[4] The Waller analysis, while perhaps appropriate for certain species of sixth amendment claims, ill fits cases in which what is at stake is the trial judge's ability to maintain authority over the physical environs where he presides. These different concerns have not previously been examined by this Court in a public trial clause context, and should be now.

Historically, trial judges have been permitted, indeed required, to act decisively in the face of a threat to the integrity of the trial process. See Illinois v. Allen, 397 U.S. 337 (1970) (proper to remove disruptive defendant even if other alternatives were not fully considered); Sheppard v. Maxwell, 384 U.S. 333, 363 (1966) ("The courts must take such steps by rule and regulation that will

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[4]See Note, Confusion in the Courthouse: The Legacy of the Gannett and Richmond Newspapers Public Right of Access Cases, 59 S. Cal. L. Rev. 603, 613-18 (1986).

protect [against] outside influences"); United States ex rel. Bruno v. Herold, 408 F.2d 125, 127 (2d Cir. 1969) (witness suddenly stopped testifying and turned pale when spectators, apparently associates of the accused, began grinning and grimacing at him; trial judge immediately cleared the courtroom; held, "a Sixth Amendment situation is not reached"), cert. denied, 397 U.S. 957 (1970). Without reaching the issue, this Court has indicated that such measures might properly lie within the trial court's discretion. Gaines v. Washington, 277 U.S. 81 (1928).[5]

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[5]Gaines contrasted the view that closure could occur almost on a trial court's whim, Reagan v. United States, 202 F. 488 (9th Cir. 1913), with the more conservative view that such discretion may not be exercised frivolously but must be reasoned. Davis v. United States, 247 F. 394 (8th Cir. 1917). Yet even the more restrictive view characterized by Davis implicitly recognized and condoned discretion to close the courtroom in the face of an immediate threat to the integrity of the proceedings.

Since the Waller decision, however, uncertainty has arisen in this area of courtroom procedure. Waller adopted, in toto, the analytical framework already established for first amendment press access cases. This framework requires the judge to conduct a full hearing before closing off any discrete stage of trial proceedings. The judge must consider the public harm resulting from exclusion, as well as any less restrictive alternatives that might protect competing privacy interests. See 467 U.S. at 48.

When transported outside of its context, the practical effect of the Waller approach is to chill the use of measures traditionally available to trial judges to maintain order, protect witnesses, ensure a fair trial, and expedite litigation. For example, the common and innocuous practice of locking the courtroom doors during the charge to the jury was held to violate the

sixth amendment in People v. Venters, 124 A.D.2d 57, 511 N.Y.S.2d 283 (1987) (citing Waller).

Clearly, there are situations under the public trial clause, just as under the confrontation clause, where traditional practice does not implicate the sixth amendment.[6] In this case, it was undisputed that a key witness and his family had been threatened, and that the intimidated witness was afraid to testify in public. Since the witness had been threatened both anonymously and boldly, in the halls of the courthouse itself, the intimidation he felt could not have been negated by requiring him to single out individuals in the room for removal. Such a procedure, indeed, would likely have heightened the witness's fear. Accordingly, rather than allow his

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[6] E.g., Dutton v. Evans, 400 U.S. 74 (1970) (Harlan, J., concurring) (statement admitted under valid hearsay exception does not implicate confrontation clause).

courtroom to be used to obstruct justice, the trial judge briefly cleared the premises.

Historical practice without question would have permitted this temporary closure of the courtroom without implication of the sixth amendment.[7] Applying the Waller

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[7] E.g., United States v. Hernandez, 608 F.2d 741 (9th Cir. 1979) (courtroom closed for part of testimony of threatened witness afraid to testify); United States v. Eisner, 533 F.2d 987 (6th Cir.) (courtroom closed for testimony of one witness because trial judge had "reason to believe" witness was afraid of persons in the courtroom), cert. denied, 429 U.S. 919 (1976); United States ex rel. Smallwood v. LaValle, 377 F. Supp. 1148 (E.D.N.Y.) (courtroom closed for testimony of pregnant, fifteen-year-old witness afraid of defendant's friends, who were spectators), aff'd, 508 F.2d 837 (2d Cir. 1974), cert. denied, 421 U.S. 920 (1975); United States ex rel. Orlando v. Fay, 350 F.2d 967 (2d Cir. 1965) (courtroom cleared where unidentified persons had threatened prosecution witness and spectators created disturbance in the courtroom), cert. denied, 384 U.S. 1008 (1966); State v. Callahan, 100 Minn. 63, 110 N.W. 342 (1907) (courtroom cleared for testimony of rape victim intimidated by "obtrusive" spectators); Lide v. State, 133 Ala. 43, 31 So. 953 (1901) (spectators removed for applauding prosecution); Grimmett v. State, 22 Tex. App. 36, 2 S.W. 631 (1886)

(continued...)

standard, however, the Pennsylvania Superior Court found reversible error. Accord State v. Klem, 438 N.W.2d 798 (N.D. 1989) (closing courtroom for one intimidated witness violates sixth amendment).

On virtually identical facts, however, closure was approved in Douglas v. Wainwright, 739 F.2d 531 (11th Cir. 1984), cert. denied, 469 U.S. 1208 (1985). The reason is that several federal courts of appeals have sub silentio refused to follow Waller, adopting a "more lenient" standard of review for such closures.[8] This effort

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[7](...continued)
(courtroom temporarily closed where jeering of unidentified persons in crowd intimidated young female witness in rape case); see Commonwealth v. Principatti, 260 Pa. 587, 598, 104 A. 53 (1918) (court has inherent power to remove spectators for testimony of intimidated defense witness); see also Davis v. United States, 247 F. 394 (8th Cir. 1917) (collecting cases).

[8]E.g., Nieto v. Sullivan, 879 F.2d 743 (10th Cir. 1989); United States v. Sherlock, 865 F.2d 1069 (9th Cir. 1989); United States ex rel. Morgan v. Lane, 705 F. Supp.
(continued...)

to accommodate measures traditionally outside sixth amendment strictures to the procedural constraints of Waller clearly demonstrates that further examination of this constitutional provision is due.

The difficulty of the courts of appeals in applying Waller results from the fact that certain measures simply do not impinge upon the concerns embodied in the public trial right of the sixth amendment, and have always been an integral part of the trial process. Thus, even though the public is necessarily excluded from them, sidebar conferences and even many in camera

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[8](...continued)
410 (N.D. Ill. 1989), aff'd, 897 F.2d 531 (5th Cir. 1990).

The Douglas case does not purport to depart from the Waller standard at all, but only protests that it faced different facts. The other circuits that have followed Douglas, however, read it as creating a new standard of review. That a different standard is thought necessary in the Fifth, Ninth, Tenth and Eleventh Circuits is a signal that further review of the sixth amendment public trial right is appropriate.

proceedings during trial simply do not implicate the sixth amendment in any meaningful sense. The archetypical image of a judge warning an unruly gallery that further outbursts might result in their expulsion, too, does not bring to mind concerns historically related to the sixth amendment. That amendment has always been understood as a means to securing a fair trial, not an end in itself. The notion that Waller alone provides an adequate mechanism to preserve the trial court's power to prevent public presence from overwhelming the goal of a fair trial is belied by the present case, by cases such as State v. Klem, People v. Venters, and by the lower federal courts' improvised alternate standard of review. The point is not that the Waller analysis was misapplied here or in those cases, but that it should not have been applied at all, because the sixth amendment was not implicated.

Waller also left open the question of harmless error.[9] In Arizona v. Fulminante, 59 U.S.L.W. 4235, 4243 (U.S. March 26, 1991), five members of this Court joined in the view that only errors which constitute "structural defects in the constitution of the trial mechanism," affecting the "entire conduct of the trial from beginning to end," should be exempted from a harmless error analysis.

Assuming an error which clearly implicates sixth amendment concerns, such as the unwarranted closure of the entire suppression hearing in Waller, it is usually true that a harmless error analysis could not accurately be undertaken, and so would be inappropriate.[10] But where a trial

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[9]The Court noted only that the parties did not question that the defendant was not obliged to prove "specific prejudice." 467 U.S. at 49.

[10]See Stacy & Dayton, Rethinking Harmless Constitutional Error, 88 Colum. L. Rev. 79, 113-15 (1988), maintaining that (continued...)

judge, as here, orders a temporary closure to permit an intimidated witness to testify who otherwise would not have done so, a harmless error analysis should not be foreclosed. Far from constituting a "beginning to end" defect, such action as is undertaken to preserve the unimpaired constitution of the trial mechanism renders a harmless error analysis more, not less, appropriate.

In this case, there has never been a claim that the integrity of the evidentiary proceedings was in any way impaired by the brief absence of spectators. On the

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[10](...continued)
the difficulty of evaluating the effect of closure of a proceeding on the outcome of that proceeding renders a rule of automatic reversal "generally appropriate." The effect of de minimis closures for the purpose of maintaining the integrity of the proceedings, however, has not been considered in a harmless error context. Similarly, Fulminante identifies public trial issues as being generally exempt from harmless error, but does so in the context of discussing errors which taint the trial "from beginning to end."

contrary, it was the intimidators who sought to skew the evidence. The trial judge attempted to accommodate any legitimate concerns by allowing the defense to select individuals to remain. But respondent, who had already declared that he would not do time for this crime, and who was in a position to know the kind of testimony the witness could provide, insisted on all or nothing. Under these circumstances, a reviewing court should at least be permitted to consider whether the trial judge's "error," if any, in reducing the atmosphere of fear in his courtroom was harmless beyond a reasonable doubt. State v. Robillard, 146 Vt. 623, 508 A.2d 709 (1986) (locking courtroom doors during testimony harmless because spectators could enter during recesses); People v. Hargrove, 60 A.D.2d 636, 400 N.Y.S.2d 184 (1977) (removal of two spectators whose presence made witness reluctant to testify did not

prejudice defendant), cert. denied, 439 U.S. 846 (1978) (concurring opinion); United States v. Acevedo-Ramos, 842 F.2d 5 (1st Cir. 1988) (non-public taped deposition played back at public trial, if error, was harmless).

In sum, while sixth amendment public trial and first amendment public access cases involve similar analyses, the rights and interests in question are not identical. A judge's use of traditional means to counter disruptive or threatening behavior in court should not automatically trigger involved hearings and multi-factored balancing tests. Nor is there any apparent reason why the public trial clause of the sixth amendment should be exempt from harmless error analysis while the confrontation clause, for example, is not. Delaware v. Van Arsdall, 475 U.S. 673 (1986). Waller v. Georgia should not stand as the alpha

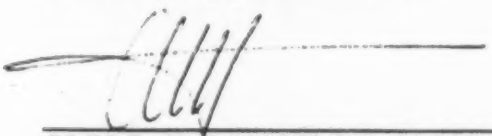
and the omega on this important constitutional question.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that a writ of certiorari issue to review the decision below.

Respectfully submitted,

HUGH J. BURNS, JR.
Assistant District Attorney
RONALD EISENBERG
Chief, Appeals Unit



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APPENDIX

Supreme Court of Pennsylvania

Eastern District

March 15, 1991

Ronald Eisenberg, Esquire
Chief, Appeals Division
DISTRICT ATTORNEY'S OFFICE
1421 Arch Street
Philadelphia, PA 19102

RE: **COMMONWEALTH OF PENNSYLVANIA,**
PETITIONER V. MEREDITH PENN
NO. 916 E.D. Allocatur Docket 1989

Dear Mr. Eisenberg:

This is to advise you that the following Order has been endorsed on your Petition For Allowance of Appeal in the above captioned matter:

"February 25, 1991

Petition Denied.

Per Curiam."

Very truly yours,

/s/ Bernice G. LaBoo
Chief Clerk

BGL/rh

cc: Hon. Paul Ribner
Athena Mary Dooley, Esquire

J. 96020/89

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	C.P.-Phila. Criminal-84-08-1593-95
MEREDITH PENN, Appellant	:	No. 617 Philadelphia 1987

O R D E R

The court hereby denies the application filed July 21, 1989, requesting reargument or reconsideration of the decision dated July 7, 1989.

/s/
PER CURIAM

DATE: August 31, 1989

J. 96020/88

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
MEREDITH PENN, Appellant	:	No. 617 Philadelphia 1987

J U D G M E N T

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of PHILADELPHIA County be, and the same is hereby REVERSED AND REMANDED FOR A NEW TRIAL. JURISDICTION IS RELINQUISHED.

BY THE COURT:

/s/ David A. Szewczak
PROTHONOTARY

Dated: July 7, 1989

J. 96020/88

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
MEREDITH PENN, Appellant	:	No. 617 Philadelphia 1987

Appeal from the Judgment of Sentence entered January 28, 1987 in the Court of Common Pleas of Philadelphia County, Criminal Division, No. 84-08-1593-1595.

BEFORE: CIRILLO, P.J., BECK, AND KELLY, JJ.

FILED JULY 7, 1989

OPINION BY KELLY, J.:

In this case we are called up to determine whether the trial court abused its discretion and committed reversible error in closing a trial to the public during the testimony of a Commonwealth witness who alleged that he had been threatened and harassed by unidentified persons who did not want him to testify against appellant at his murder trial. For the reasons which follow, we reverse and remand for a new trial.

The relevant facts may be accurately summarized as follows. Appellant was arrested and brought to trial on murder charges relating to the shooting death of his estranged common-law wife in Philadelphia on August 4, 1984. Mr. Theodore Reed, a security guard and friend of appellant, was subpoenaed to testify against appellant regarding a full and detailed confession of the crime made by appellant to Mr. Reed shortly after the murder. Mr. Reed failed to appear in compliance with the subpoena and so a bench warrant was issued for his arrest.

Prior to the start of the afternoon session on the second day of the trial, the prosecutor informed the court that Mr. Reed had voluntarily presented himself at the prosecutor's office and was now prepared to comply with the subpoena. The prosecutor informed the court further that Mr. Reed had explained his failure to appear as the

result of his fear following the breaking of several windows at his home and the receipt of several anonymous calls on the previous evening which threatened injury to him and his four children if he testified against appellant at trial, as well as being accosted outside the courtroom that morning by persons he could not or would not identify, who also requested that he change his testimony. The prosecutor indicated that Mr. Reed was "perfectly willing to testify, but that he was very intimidated about testifying in front of a full courtroom." (N.T. 9/10/86 at 89). The prosecutor moved that the bench warrant against Mr. Reed be withdrawn, and that the court be closed to spectators during Mr. Reed's testimony.

Counsel for appellant agreed that anyone who was attempting to intimidate a witness or suborn perjury should be identified and prosecuted. Counsel indicated

that there were numerous defense witnesses and supporters present for the trial and requested that Mr. Reed be brought in to view those present and then have him identify anyone who intimidated him, or of whom he was afraid. Counsel noted that Mr. Reed was an adult male who was employed as a security guard, and not a child witness or a victim of a sex crime for whom special consideration might be appropriate. Finally, counsel objected to the motion to clear the courtroom of all spectators during Mr. Reed's testimony on the basis of appellant's Sixth Amendment right to a public trial.

The trial court granted the motion to close the courtroom during Mr. Reed's testimony and denied appellant's motion for a mistrial on the basis of the closure. After Mr. Reed's testimony, the public was again admitted into the courtroom.

Appellant was convicted of murder in the first degree and possession of an instrument of crime. Post-verdict motions were filed, briefed, argued, and denied. On January 28, 1987, appellant was sentenced to life imprisonment on the murder conviction and a concurrent two and one-half to five year term of imprisonment on the possession of an instrument of crime conviction. This timely appeal followed.

On appeal, appellant challenges the partial closure of the trial and raises three other claims of trial court error and fourteen allegations of ineffective assistance of counsel. Because we find merit in appellant's Sixth Amendment denial of a public trial claim, we decline to address his other assertions of error.

Appellant argues that reversal is mandated by our Supreme Court's decision in Commonwealth v. Contakos, 499 Pa. 340, 453 A.2d 578 (1982) (plurality). The

Commonwealth notes that because Contakos was a plurality opinion it is not binding on this Court, and argues instead that a trial court has inherent discretionary authority to clear the court during the testimony of a witness who has been threatened. The Commonwealth cites Commonwealth v. Knight, 469 Pa. 57, 364 A.2d 902 (1976) and Commonwealth v. Wright, 255 Pa. Super. 512, 388 A.2d 1084 (1978) as controlling precedent. While each of the cases cited by the parties is relevant to our decision, our course lies between the two extremes urged and is guided by other authorities as well.

"Criminal trials in the United States have, by historical tradition, and under the First Amendment, been deemed presumptively open to public scrutiny and this '... presumption of openness inheres in the very nature of the criminal trial under our system of justice.'" Commonwealth v.

Fenstermaker, 515 Pa. 501, 506, 530 A.2d 414, 417 (1987), quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573, 100 S.Ct. 2814, 2825, 65 L.Ed.2d 973, 987 (1980). The purposes of openness have been summarized as follows:

> ... generally, to assure the public that justice is done even-handedly and fairly; to discourage perjury and the misconduct of participants; to prevent decisions based on secret bias or partiality; to prevent individuals from feeling that the law should be taken into the hands of private citizens; to satisfy the natural desire to see justice done; to provide for community catharsis; to promote public confidence in government and assurance that the system of judicial remedy does in fact work; to promote the stability of government by allowing access to its workings, thus assuring citizens that government and the courts are worthy of their continued loyalty and support; to promote an understanding of our system of government and courts.

Commonwealth v. Fenstermaker, supra, 530 A.2d at 417, citing Richmond Newspapers, Inc. v. Virginia, supra and Gannett Co. v. DePasquale, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979). The openness of criminal trials and the purposes which this

openness is intended to serve, are protected not only by tradition, but by provisions in both the United States and the Pennsylvania Constitutions as well. See U.S. Const. Amend. 1; U.S. Const. Amend. 6; U.S. Const. Amend. 14; Pa.Const. Art. 1, sec. 7; Pa.Const. Art. 1, sec. 9; Pa.Const. Art. 1, sec. 11.

In the instant case, appellant only raised a federal Sixth Amendment claim at trial. He has waived any separate claims under other provisions of the United States or Pennsylvania Constitutions relating to the right to a public trial. In noting this fact we do not imply that other constitutional provisions would be construed to provide different protection or require different analysis. Rather, we merely note that the issue preserved and the analysis which follows are limited to the consideration of appellant's Sixth Amendment rights.

In Waller v. Georgia, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984), the United States Supreme Court noted the particular interests of criminal defendants which the openness of criminal proceedings mandated by the Sixth Amendment was designed to protect:

> The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions . . . .
>
> In addition to ensuring the judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury.

467 U.S. at 46, 104 S.Ct. at ___, 81 L.Ed.2d at 38. The Supreme Court stated further that "there can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First

Amendment right of the press and the public." Id.

Though the right to an open public trial is central to our system of criminal justice, the right is not absolute. In Waller v. Georgia, supra, the Supreme Court explained:

> The right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information. Such circumstances will be rare, however, and the balance of interests must be struck with special care.

467 U.S. at 45, 104 S.Ct. at ___, 81 L.Ed.2d at 38.

Courts have generally held that limitations on public access to criminal proceedings may also be justified by: courtroom capacity limitations; the need to preserve order and decorum; the need to protect victims, witnesses, or jurors from serious embarrassment, trauma or intimidation; and, the need to protect youthful

spectators from exposure to testimony which might shock, distress, or tend to corrupt morals. See Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510-12 & n.10, 104 S.Ct. 819, ___ & n.10, 78 L.Ed.2d 629, 638-39 & n.10 (1984) (serious embarrassment of jurors during voir dire); Richmond Newspapers, Inc. v. Virginia, supra, 448 U.S. at 600 & n.5, 100 S.Ct. at ___ & n.5, 65 L.Ed.2d at 1005 & n.5 (capacity limitations, serious embarrassment of youthful victim of a sex crime); Gannett Co. v. DePasquale, supra, 443 U.S. at 388 n.19, 99 S.Ct. at ___ n.19, 61 L.Ed.2d at 626 n.19 (serious trauma, embarrassment or intimidation of adult or juvenile witnesses or victims; juvenile spectators; order and decorum); Commonwealth v. Berrigan, 509 Pa. 118, ___, 501 A.2d 226, 232-34 (1985) (courtroom capacity; juror intimidation; order and decorum); Commonwealth v. Knight, supra, 364 A.2d at 906 & nn.6-9 (trauma to

child witness, order and decorum, juvenile spectators); Commonwealth v. Burton, 459 Pa. 550, ___, 330 A.2d 833, 837 (1975) (intimidation of an adult witness); Commonwealth v. Trinkle, 279 Pa. 564, 569-71, 124 A. 191, ___ (1924) (capacity of temporary courtroom at witness' sick bed).[1]

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[1]See also Commonwealth v. Howard, 324 Pa. Super. 443, ___, 471 A.2d 1239, 1242-45 (1984) (order and decorum, intimidation of jurors and witnesses, general security); Commonwealth v. Smith, 280 Pa. Super. 222, ___, 421 A.2d 693, 694 (1980) (dicta, embarrassment, trauma of rape victim); Commonwealth v. Wright, supra, 388 A.2d at 1086 (embarrassment, trauma of adult rape victim, intimidation of witnesses); Commonwealth v. Hodge, 246 Pa. Super. 71, ___, 369 A.2d 815, 819 (1977) (dicta, voluntary removal of high school students to minimize trauma to adult rape victim and protect the sensibilities of juvenile spectators); Commonwealth v. Stevens, 237 Pa. Super. 457, ___, 352 A.2d 509, 514 (1975) (embarrassment, trauma of adult rape victim), Commonwealth ex rel. Paylor v. Cavell, 185 Pa. Super. 176, ___, 138 A.2d 246, 249 (1958) cert. denied 358 U.S. 854, 79 S.Ct. 84, 3 L.Ed.2d 88 (1958) (dicta, courtroom capacity, juvenile spectators); Annotation, Exclusion of Public from State Criminal Trial In Order to Avoid Intimidation of Witness, 55 ALR4th 1196 (1987 & 1988 Supp.); Annotation, Exclusion of Public From State Criminal Trial In Order to

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This case involves an order which directed the court to be cleared during the testimony of a witness who was reported to have claimed that he was intimidated by unnamed persons who sought to prevent or alter his testimony against appellant. In appropriate cases, full or partial closure of criminal proceedings may properly be granted in response to witness intimidation. See Gannett Co. v. DePasquale, supra, 433 U.S. at 338 n.19, 99 S.Ct. at ___ n.19, 61 L.Ed.2d at 626 n.19 (collecting cases); Commonwealth v. Berrigan, supra, 330 A.2d at 837 (defendant's wife and other identified spectators were removed during the testimony of a particular witness to prevent intimidation); Commonwealth v. Principatti, 260 Pa. 587,

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[1](...continued)
Prevent Disturbance By Spectators or Defendant, 55 ALR4th 1170 (1987 & 1988 Supp.); Annotation, Federal Constitutional Right To A Public Trial In Criminal Case - Federal Cases, 61 L.Ed.2d 1018 (1980 & 1988 Supp).

598, 104 A. 53, ___ (1918) (trial court was held to have erred in holding that it had no power to clear the court during testimony of witness who feared intimidation and retaliation); Commonwealth v. Wright, supra, 388 A.2d at 1086 (courtroom was properly cleared during cross-examination of a visibly traumatized rape victim who had been threatened by members of the defendant's family).

Witness intimidation and retaliation against witnesses are serious crimes which the Commonwealth has clear interest in deterring, detecting, and sanctioning. First and foremost, the Commonwealth has an interest in protecting its citizens from intimidation and injury by criminal conduct. Second, the Commonwealth also has an interest in protecting victims and witnesses from intimidation or retaliation because of the indispensable role they play in the operation of the justice system. In

NLRB v. Indiana & M.E. Co., 318 U.S. 9, 63 S.Ct. 394, 87 L.Ed. 579 (1942), Justice Robert H. Jackson forcefully admonished:

> The influence of lawless force directed toward parties or witnesses to proceedings during their pendency is so sinister and undermining of the process of adjudication itself that no court should regard it with indifference or shelter it from exposure and inquiry.

318 U.S. at 29, 63 S.Ct. at ___, 87 L.Ed. at 592. Succinctly, if the means of justice are to be preserved and the ends of justice protected, courts must exercise their discretion so as to dispel any belief that intimidation of victims or witnesses will serve the ends to which the intimidation is directed.

Studies in the early part of this decade revealed that witness intimidation was more prevalent and more disruptive of the administration of criminal justice than had generally been assumed. See Connick & Davis, Examining the Problem of Witness Intimidation, 66 Judicature 438, 438-46

(1983); see also Hudson, The Crime Victim and the Criminal Justice System: Time For A Change, 11 Pepperdine L.Rev. 23, 52-55 (1984). Results of studies in various jurisdictions indicated that from 8% to 48% of all complaining witnesses had been subjected to some form of intimidation by the defendant or someone acting on the defendant's behalf. The studies also revealed that while most witnesses who reported intimidation attempts found the official response helpful, many felt that the response was nonetheless inadequate. Connick & Davis, supra, 66 Judicature at 45. One New York study disclosed that even after prior intimidation had been reported, 22% of the victims were again subjected to intimidation; the rate was even higher when, as here, the defendant and the witness knew each other prior to the offense pending before the court (30% versus 12%

where the witness and the defendant were strangers to each other). Id.

In 1980 (shortly before the studies discussed above had been reported), Pennsylvania enacted new statutory provisions designed to empower the criminal justice system to respond more effectively to the problem of witness intimidation. See 18 Pa.C.S.A. §§ 4951-56. The basic components of the new provisions were: the regrading of many forms of intimidation as a third degree felony (rather than a simple misdemeanor); providing for protective orders and contempt powers to enforce such orders; and, providing that, any pre-trial release must include conspicuous notice that the terms of the release include, as a matter of law, a condition that the defendant neither do, cause to be done, nor permit to be done any act of intimidation or retaliation against the victim or any witness to the crime charged against the defendant who

had been granted the pre-trial release. This Commonwealth has thus expressly recognized its vital interest in deterring, detecting, and sanctioning attempts to intimidate victims and witnesses.[2]

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[2]We note, however, the following sober accessment [sic] of such reforms by Paul Hudson of the New York State Crime Victim's Board:

> A model statute prepared and issued by the American Bar Association in 1980 has provided the guidance for new legislation enacted in seven states and by the federal government. While the enactments are too recent for any studies to be completed on the effect of these reforms, at least one study done in the New York City court system in 1981 indicates that much more than a new statute will be required. This study indicates the need for higher penalties, admonishments, orders of protection, bail revocations, relocation services, security of waiting areas and, most importantly, prosecution and investigation of reported intimidation on a systematic basis. Present levels of prosecution are so low, and response of many police agencies to reported threats is so inadequate (i.e., nothing can be done unless a crime is committed or until the defendant takes overt action to carry out his threats), that major efforts by the criminal justice system would be required to restore a sense

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However, a bald assertion of alleged intimidation does not justify the kind of encroachment on a defendant's Sixth Amendment right to a public trial which clearing the courtroom for a witness' testimony entails. To the contrary, specific procedures designed to ensure a proper balancing of competing interests must be followed before even a partial closure for a single witness' testimony may be ordered. In Waller v. Georgia, supra, the Supreme Court held unanimously that:

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[2](...continued)
of deterrence in criminal defendants and a sense of confidence in victims.

Hudson, supra, 11 Pepperdine L. Rev. at 54-55 (footnotes omitted). Victim intimidation arrest statistics are not reported separately in Pennsylvania's annual Uniform Crime Report; moreover, we have been unable to discover any statistical account of the numbers of protective orders entered or pre-trial release revocations ordered relating to witness intimidation since the 1980 reforms were enacted. Only three appellate decisions have been reported relating to the provisions, an indication, perhaps, that they are underemployed.

> "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered."

467 U.S. at 42, 104 S.Ct. at ___; 81 L.Ed.2d at 36, quoting Press Enterprise Co. v. Superior Ccurt, supra, 464 U.S. at 510, 104 S.Ct. at ___, 78 L.Ed.2d at 638.

In the instant case, the trial court made no findings whatsoever regarding the nature, extent, or impact of the alleged intimidation on Mr. Reed. Rather than questioning Mr. Reed himself, the trial court relied entirely on the prosecutor's second-hand, hearsay, rendition of the allegations made by Mr. Reed in explanation of his failure to comply with the court's subpoena. Indeed, the trial court specifically stated:

> Let me say this for the record. The Sixth Amendment in my legal opinion, and I so find, the Sixth Amendment,

> the right to an open trial, has to give way in a situation where a witness claims he was threatened.
>
> I can't determine whether or not he is actually threatened right now, and if he was by whom, but I have to give weight to that kind of statement because we cannot have any witness hurt or have his family threatened or hurt and then later we find that we should have done something.
>
> I believe the Sixth Amendment right has a limitation as to the safety of the family and/or the witness involved.

(N.T. 9/10/86 at 93). (Emphasis added).

We find that the trial court abused its discretion in failing to examine Mr. Reed for itself, in camera if necessary, in order to access [sic] his credibility and to determine the nature, extent, and impact of any attempts to intimidate Mr. Reed and prevent or alter his testimony, or to otherwise make specific factual determinations based upon sufficiently reliable information which would support a conclusion that important interests existed which would justify the partial closure ordered.

While the right to a public trial may certainly bow to interests in protecting witnesses from injury or intimidation in some cases, such an encroachment on a defendant's rights requires, at a minimum, that the trial court first determine whether or not the threat of injury or intimidation in fact exists. See Waller v. Georgia, supra.

Likewise, we find that the trial court abused its discretion in failing to consider alternatives to closure and explain on the record why alternatives would be impractical or inadequate to serve the interest(s) that closure of the trial during Mr. Reed's testimony was intended to protect. See Commonwealth v. Buehl, 316 Pa. Super. 215, ___, 462 A.2d 1316, 1322 (1983). In the instant case, the trial court failed entirely to explain why ordinary or augmented courtroom security measures would not be sufficient to ensure Mr.

Reed's safety while he testified in open court, or how closure of the court during his testimony would protect Mr. Reed or his children from retaliation outside of the courtroom.

Closure of the courtroom to the public is not the only, nor necessarily the most effective, response to victim intimidation. In response to reports of intimidation a trial court may, among other options: act to have the parties involved identified and prosecuted; enter appropriate protective orders; issue appropriate admonitions to the defendant and any courtroom spectators regarding applicable criminal sanctions as well as the court's contempt powers which would be invoked in response to any attempt to injure or intimidate a witness; and, direct that appropriate security measures be taken to ensure safety within the

courthouse.[3] While deference to law enforcement personnel with expertise and experience in witness protection would certainly be appropriate in making findings as to what measures are necessary in a particular case to ensure the safety of a witness and to protect a witness from intimidation, closure of the courtroom, nevertheless, should remain the last option considered or employed.

As indicated above, we are well aware of the Commonwealth's vital interests in protecting the safety of witnesses and

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[3] See generally 18 Pa.C.S.A. §§ 4951-56; Connick & Davis, supra, 66 Judicature at 438-46; Hudson, supra, 11 Pepperdine L.R. at 52-55. With respect to court security measures, we note that Philadelphia courts have recently began using metal detectors to keep weapons out of courtrooms; metal detectors used at the federal courthouse in Philadelphia led to the seizure of 5,600 weapons in the past four years. See Locy, "5600 Weapons Seized in Court Over 4 Years," Philadelphia Daily News, at 8 (April 11, 1989); see generally Mallory, Order in the Court: Keeping our Courtrooms Safe, 11 Pa.Lawyer 10, 10-16 (March 1989) (discussing court security throughout the Commonwealth).

ensuring the integrity of the criminal justice system. Our conclusion that closure of the court in this case was improper is in no way intended to minimize those interests or suggest that full or partial closure as to some or all members of the public would not be appropriate in response to victim or witness intimidation in other cases. To the contrary, there are certainly circumstances where such drastic measures may be necessary, and therefore constitutionally permissible.[4] We simply

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[4]Such measures, of course, should be taken in the manner least likely to arouse prejudice against the defendant from the jury. Indeed, the concurring opinion of Justice Roberts in Commonwealth v. Contakos, supra (joined by Chief Justice O'Brien), appears to be focussed on the prejudicial effects of the "abrupt exclusion" of the public, rather than any question as to whether the interests in protecting the witness were "compelling" or whether the partial closure was "necessary". 453 A.2d at 582. It may be that declaration of a mistrial is the steep but unavoidable price of witness protection when the only means adequate to ensure the safety of a witness would create a substantial likelihood of undue prejudice to the

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hold that in the instant case the findings required to justify such an order were not made.[5]

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[4](...continued)
defendant. However, the risk of such prejudice may and should be avoided and/or minimized in many cases. For example, removals, protective orders, and admonitions often may be made out of the hearing of the jury, either before a session starts or during a brief recess called for that purpose.

[5]Some federal courts have held that a "substantial" interest rather than a "compelling" interest is all that is constitutionally required to justify a "partial" closure of proceedings, i.e. for the testimony of one of several witnesses, as opposed to the "complete" closure of a proceeding as in Waller v. Georgia, supra. See United States v. Sherlock, 865 F.2d 1069, 1076-77 (9th Cir. 1989); Douglas v. Wainwright, 739 F.2d 531, 533 (11th Cir. 1984), cert. denied 469 U.S. 1208, 105 S.Ct. 1170, 84 L.Ed.2d 321 (1985). Our Supreme Court has not framed its analysis in terms of "substantial" versus "compelling" interests; rather, our Supreme Court has focused more generally on whether the trial court "abused its discretion" in determining that "important" interests justified the restrictions imposed. See Commonwealth v. Berrigan, supra, 501 A.2d at 234 n.10 (also narrowly construing Commonwealth v. Contakos, supra). We find that while protecting witnesses from intimidation is plainly a vital interest, the trial court's failure to make necessary
(continued...)

The denial of a defendant's Sixth Amendment right to an open public trial during the testimony of a Commonwealth witness at trial requires reversal and remand for a new trial. See Waller v. Georgia, supra, 467 U.S. at 49-50, 104 S.Ct. at ___, 81 L.Ed.2d at 40-41; Commonwealth v. Contakos, supra, 453 A.2d at 582 (per Flaherty, J.; Larsen, J., joined); id. (per Roberts, J.; O'Brien, C.J., joined); Commonwealth v. Knight, supra, 364 A.2d at 906; Commonwealth v. Johnson, supra, 455 A.2d at 658. But see Waller v. Georgia, supra, 467 U.S. at 49-50, 104 S.Ct. at ___, 81 L.Ed.2d at 40-41 (a new trial is not automatically required for improper closure

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[5](...continued)
finding with respect to the fact, nature, and extent of the intimidation and the adequacy of alternatives, renders any distinction between "compelling," "important," or "substantial" interests moot in this case. Cf. Commonwealth v. Murray, 348 Pa. Super. 439, ___, 502 A.2d 624, 629 (1985) (dicta, a "compelling interest is required").

of a suppression hearing, rather a new open suppression hearing must be held, and a new trial will be granted only if the new open suppression hearing results in the suppression of evidence not suppressed in the closed hearing which might reasonably have altered the outcome at trial); Commonwealth v. Murray, supra, 502 A.2d at 629-31 (despite improper closure of the preliminary hearing neither a new trial nor a new preliminary hearing were required; rather, the defect was cure[d] by a fair and open trial, and the availability of an interlocutory appeal would prevent repetition of the error in subsequent proceedings).[6]

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[6]We note that a fundamental difference exists between the posture of this case and that of Commonwealth v. Smith, 280 Pa. Super. 222, 421 A.2d 693 (1980), wherein this Court noted the existence of a plausible justification for the closure order challenged, and remanded for a hearing to enable the parties and the trial court to supplement the record. In Smith, this Court found remand necessary to cure ambiguities and to fill omissions in the official record as to what had occurred in the

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Conclusion

Based upon the foregoing, judgment of sentence is reversed and the case is remanded for a new trial. Jurisdiction relinquished.

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[6](...continued)
trial court, i.e. what were the precise terms of the closure, what objections were made, and how did the closure order actually effect [sic] the openness of proceedings (who was removed or barred and for how long). Nothing in the remand directive issued in Smith implied an opportunity to cure a failure to make findings necessary to justify closure. To the contrary, this Court held explicitly in Commonwealth v. Buehl, supra, that post hoc justifications for closure orders are not sufficient to support the closure order at the time of its original entry. 462 A.2d at 1323; see also Commonwealth v. Murray, supra, 502 A.2d at 629 & n.5. In Smith, the record was not clear as to what exactly transpired in the trial court; here, on the other hand, the record is complete and the relevant facts are clear. Hence, remand for clarification, as in Smith, is not required.

COMMONWEALTH OF PENNSYLVANIA	:	COURT OF COMMON PLEAS
	:	
	:	CRIMINAL TRIAL
	:	DIVISION
VS.	:	
	:	PHILADELPHIA
	:	COUNTY
	:	
	:	AUGUST TERM,
	:	1984, NOS.
MEREDITH PENN	:	1593-1595

OPINION

Following a four day jury trial, defendant, Meredith Penn, was convicted of first degree murder and possessing instruments of crime. Testimony at the trial reveals that the defendant and the victim had lived together and had a child, after which the victim obtained a modeling job in New York and separated from the defendant. Defendant had been trying to effect a reconciliation and according to the defendant's testimony he had been assaulted sometime before the killing by one "Gregory" who was a rival for the victim's affections. On the day of the murder, the

defendant had been arguing with the victim before they drove off in his car. He was later seen holding a black stick-like object in his hand, pointing at the left temple of a female passenger. The defendant testified that he had kept a gun in a duffle bag on the floor of his car for protection from "Gregory" and that the shooting was a result of the struggle for possession of the gun between the defendant and the victim, as a result of which the gun went off accidentally. He testified further that the victim had leaned over into the back of the car and attempted to remove the gun from the duffle bag but after she touched it, he grabbed it first. Everything happened very fast according to the defendant and when both of their arms came back to the front of the car, he had the gun in his hand. At that moment she had her hand on his gun hand and was trying to get out of the car at which time the gun

went off accidentally. A witness testified she heard a gunshot, and saw a male go around to the passenger's side, open the door and pull a body out of the car. The police were called and when the officer arrived at the scene, he found the victim's body lying in the highway.

Post-Trial Motions were filed in which the following three errors were claimed.

I. THE OBJECTION TO DEFENSE WITNESSES

The Court sustained the prosecution's objection to the testimony of two neighbors of the defendant who were to testify as to the defendant's difficulties with "Gregory", the rival for the victim's affection. The theory of the defense was that these witnesses would corroborate defendant's testimony, which was given to the jury, regarding an assault by "Gregory" on the defendant sometime prior to the homicide. The defense claims that those witnesses

would corroborate the defendant's assertion that his state of mind was one of fear of "Gregory" and that was why he had the gun in the car. The import of this testimony, according to the defense, was that this would negate any inference that the defendant had the gun in his car for the purpose of killing the victim. However, this Court indicated to the prosecutor that if there was to be any argument to the jury that the defendant carried the gun in his car for the purpose of killing the victim, the testimony would be admitted to buttress other testimony and evidence that the gun was in the car because the defendant was afraid of "Gregory". It is noted that the defendant had already testified as to the incident with "Gregory" and the Court allowed photographs of the defendant's apartment to be shown to the jury which showed vandalism, purportedly committed by "Gregory" after the killing. The prosecutor answered the

Court's query by stating that he would not argue that the gun was put in the car for the purpose of shooting the victim. This was clearly confirmed by the Court as follows:

> "THE COURT: He didn't purchase the gun because of any fear like that.
>
> All right. If the District Attorney is not going to argue to the jury that he went and got the gun and put it in the car because he intended to kill her, in which case you certainly have the door opened to other testimony.
>
> If he doesn't argue that, then I am going to sustain the objection to any testimony about what happened in the house after the shooting and about any further confrontation between Gregory and the defendant." (N.T. 9/10/86, P. 289)

Insofar as the defense wanted to argue that the state of mind of the defendant at the time of the shooting was one of fear of "Gregory", this fear is totally irrelevant as to the defendant's intent or action at the time of the shooting of the victim. The defendant also testified quite clearly that it was the victim who reached for the

gun and caused the defendant to struggle for possession of the gun and that this was merely an accidental shooting. This testimony was all put before the jury and the Court charged that in addition to first degree or third degree murder, they could also bring in a verdict of voluntary manslaughter or involuntary manslaughter. The latter charge would cover the circumstances of the shooting as the defendant related them from the witness stand and if the jury had believed the defendant, they could have found him not guilty or guilty of involuntary manslaughter under the Court's charge. We also note that in line with the discussion regarding the proffered testimony of the neighbors, the prosecutor did not at any time argue to the jury or introduce evidence that the gun was carried in the car as part of any premeditated plan to shoot the victim. It is further noted that the Court told the defense counsel that

because of the evidence that was in the record, he could argue to the jury that the gun was carried in the car because of the earlier confrontation with "Gregory". Considering all of the circumstances, the testimony which was rejected was not relevant and the objection was properly sustained.

II. ALLEGED IMPROPER REMARKS OF PROSECUTOR DURING CLOSING ARGUMENT

The defense contends that during his closing speech the prosecutor made remarks that should have led to a mistrial and those remarks are set forth as follows:

A. The prosecutor argued that the defendant had a "tremendous advantage" after having heard all of the witnesses testify in that he could explain away their testimony.

B. The defendant had an advantage because the case didn't come to trial for two years and that it is "a long period of

time to think about what he was going to tell when he got on the witness stand".

C. "If anyone in this courtroom has a motive to falsify his or her testimony and to lie...it is the defendant."

D. The prosecutor categorized the defendant's testimony as "snowballing" and referred to defendant as "a good story teller."

E. "If he can ad lib that on the stand as we go along, think what he can make up in two years."

F. Characterizing the defendant's explanation of Gregory's inability to find him as "bull".

G. The prosecutor commented on defendant's claim that his gun had been stolen in the burglary of his home just two days after the shooting, stating "Are you going to swallow that ladies and gentlemen?".

H. The prosecutor told the jury that it could not show mercy or sympathy and

that it had to convict the defendant of murder in the first degree.

The prosecutor certainly has a right to comment on the defense testimony and upon the statements of the defendant made from the witness stand. At no place in this record can we find any statement of the prosecutor which can be classed as a personal belief or an opinion on the issues or on the defendant's testimony nor do we find any statement in which the prosecutor called the defendant a "liar". Comments of the prosecutor cannot be taken out of context but must be read in light of the entire record before any conclusion can be drawn as to the effect of the remarks. As the Court stated in Commonwealth v. Dickerson, 406 Pa. 102, 110, 176 A.2d 421 (1962),

> "However, when one reads the record of the entire situation, the complaints are diminitus (sic) and tenius (sic) and we are convinced no real prejudice resulted."

This Court instructed the jury that they should not accept the speeches of counsel as part of the evidence with the following language:

> "THE COURT: ...Now finally, as I mentioned earlier in the case, the speeches of counsel, the closing speeches, all the speeches throughout the trial were not part of the evidence and you are not to consider them as evidence. However, in deciding the case, you may consider the speeches of counsel in deciding whether or not you want to draw certain inferences which they urge you to draw. You should be guided by each lawyer's argument to the extent they are supported by the evidence and insofar as they aid you in applying your own reasoning and common sense, however, you are not required to accept the arguments of either counsel. It is for you and you alone to decide the case based on the evidence as it was presented from the witness stand and the Court's instructions which I have given to you." (N.T. 9/11/86, PP. 155, 156)

Earlier in the trial, the Court similarly discussed the purpose of closing speeches by stating the following:

> "THE COURT: ...Now, closing speeches, at the conclusion of the case, again is not evidence in this case, the closing speeches will be counsel's attempt to persuade you and argue certain points of view to you in

> an attempt to get you to accept certain inferences from the evidence that has been presented or from the lack of evidence presented.
>
> And any comment made by counsel during the trial again are not evidence, unless counsel are sworn and take the stand, in which case different attorneys will continue with the case." (N.T. 9/9/86, PP. 9, 10)

The aforementioned instructions made it quite clear to the jury that counsel would not be expressing any personal beliefs nor would counsel be testifying as to facts but would merely be expressing their own arguments based on the record.

The comments regarding the defendant's advantage in having listened to other witnesses before he testified were permissible and based on the record. By reviewing the prosecutor's argument it is obvious that his argument was a fair comment on the ability of the defendant to rebut the testimony unfavorable to him. The comment that the case did not come to trial for a long period of time was also good argument

and was calculated to urge the jury to draw the inference that the defendant's testimony was well thought out and planned but not consistent with the other evidence in the case.

Again, the prosecutor's comment that the defendant had a motive to falsify his testimony, if taken out of context, might appear to be prejudicial but if read with the comments made before and after that statement is a proper comment upon the motivation of various witnesses. Indeed, the Court, in its charge, advised the jury that in deciding credibility they could take into account the interests of any witness in the outcome of the case.

> "THE COURT: ...You should consider whether the witness has anything to gain or lose from the outcome of the case and you should also think about whether and to what extent the witness' testimony is supported by or contradicted by other evidence in the case which you believe." (N.T. 9/11/86, P. 120)
>
> "...The defendant took the stand as a witness. In considering the

> defendant's testimony, you are to follow the general instructions that I gave you for judging the credibility of any witness. You should not disbelieve the defendant's testimony because he is the defendant. In weighing his testimony, however, you may consider the fact that he has a vital interest in the outcome of this trial. You may take the defendant's interest into account, just as you would the interest of any other witness, along with the other factors and circumstances bearing on credibility and in giving what weight his testimony deserves." (N.T. 9/11/86, PP. 121, 122)

With respect to the characterization of defendant's testimony as "snowballing" and as "a good story teller", the terms referred to are in no way calculated to inflame or incite the jury but are merely the prosecutor's method of arguing to the jury that they should reject the defendant's testimony. There is often a thin line between using improper language and using language which is an attempt to persuade the jury to reject certain testimony as being untrue or unworthy of belief. This Court considers the testimony during

the trial, the instructions given to the jury and the entire arguments of both counsel before deciding whether a particular phase of the argument can be characterized as error. There is nothing in the foregoing terminology which in any way indicates to the jury that the prosecutor was expressing his personal belief as to the credibility of the witness. On the contrary, this was a well-reasoned argument being made in an attempt to have the jury reject the testimony.

The other language complained of referring to what the defendant "ad libbed" after two years and the use of the term "bull" are part of the entire fabric of the prosecutor's argument and in no way prevented the jury from considering the credibility of the witnesses as instructed by the Court. All of the language complained of by the defense was proper in the context in which it was used in this case for the

foregoing reasons. Fair commentary by counsel on the evidence is within the bounds of permissible argument. When a prosecutor expresses a personal belief as to credibility or uses language which takes the issue of credibility from the trier of fact, there might be cause for complaint. However, by reading those portions of the record referred to hereinabove, it can be seen that the prosecutor in the instant case was pointing out to the jury, in a well-reasoned argument, why they should not believe the defendant's version of the killing and why there was sufficient evidence upon which to arrive at a verdict of murder.

The defense next argues that the prosecutor's question to the jury "Are you going to swallow that ladies and gentlemen?" with reference to the theft of the murder weapon two days after the shooting is reversible error. Properly viewed in

context, the prosecutor's argument referred to the defendant's testimony that his rival "Gregory" stole the gun and then failed to turn it over to the authorities which was simply an assertion not worthy of belief. The one person who would have wanted to see the defendant convicted of the crime would be the alleged thief. The defense cites numerous cases wherein remarks by prosecutors were found to be error requiring a new trial, but in reading those cases this Court concludes that there is no case which is applicable to the language used by the prosecutor in this case. For example, the defense has cited to this Court the case of Commonwealth v. Collins, 462 Pa. 495, 341 A.2d 492 (1975) for the use of the terms "smoke screen" and attempt to throw "mud in eyes of jurors". In that case, the Supreme Court reversed the conviction but noted that:

> "In this case, the prosecutor's misconduct began with his opening

> address to the jury and continued throughout the trial until he had completed his closing argument. The record of the trial in this case is over one thousand pages long. A reading of the record discloses that the misconduct of the prosecutor was not limited to isolated moments of error in the heat of trial advocacy." 341 A.2d at 493.

The defense cites Commonwealth v. Harvell, 458 Pa. 406, 327 A.2d 27 (1974), but a reading of that case reveals numerous statements by the prosecutor "that were so prejudicial as to have deprived appellant of a fair and impartial trial," (at P. 411), such as telling the jurors that "next time" they might be one of the defendant's victims. (at P. 408). This Court is unimpressed with the process of picking a statement here and a statement there from cases resulting in new trials when the reading of those cases indicates a far different atmosphere than the one found in the case at bar.

Finally, the defense contends that the prosecutor misstated the law in telling the

jury that it could not show mercy or sympathy. Suffice it to say that this Court instructed the jury that the law would come from the Court and not from counsel, but even more than that there is nothing in the prosecutor's comments which indicate that the prosecutor told the jury what the law is. It would appear from a reading of the prosecutor's summation that he was asking the jury not to bring in a verdict based on sympathy. In any event, the Court instructed the jury that whether or not there was any evidence of provocation or passion, they could still bring in a verdict of voluntary manslaughter and the Court went further and instructed the jury on involuntary manslaughter.

The record herein demonstrates that there weren't any comments by the prosecutor which could warrant a reversal of the conviction or that might be termed error. The entire record reveals that both counsel

were permitted to argue in the proper fashion to the jury and the Court instructed the jury according to the law. The matter was decided fairly by the jury and the jury verdict should stand.

III. THE COURT'S ACTION IN CLEARING THE COURTROOM OF SPECTATORS DURING THE TESTIMONY OF ONE WITNESS

The Sixth Amendment right to an open trial is not without limitation. Witness Reed explained his disappearance from the courtroom area advising that he had been threatened through telephone calls, the breaking of the windows of his residence early that morning and solicitations to change his testimony. He expressed a fear of testifying in front of a full courtroom. This Court found at that time that there was a limitation to the defendant's Sixth Amendment rights with regard to this witness because of the facts put on the record and the Court ordered the spectators to

leave the courtroom during the testimony of this one witness. In cases where a witness is threatened our Courts have not hesitated to clear the courtroom. Commonwealth v. Stevens, 352 A.2d 509, 514 (Pa. Super. Ct. 1075); Commonwealth v. Wright, 388 A.2d 1084 (Pa. Super. Ct. 1978). The trial court has discretion to close the courtroom to spectators for a brief period of time when there are exigent circumstances so requiring and in this case there was sufficient evidence put into the record to convince the Court that the witness had indeed been threatened and was indeed fearful of testifying. Under the circumstances, this Court had the duty of allowing the witness to testify without being confronted by witnesses. This is especially true inasmuch as the witness had stated that he did not know the source of the threats and was worried about his safety. The defendant was not prejudiced in any way since he was

present, counsel were present, and all court officers were present.

For all of the foregoing reasons, this Court denied Post-Trial Motions.

BY THE COURT:

6/29/88	/s/
DATE	RIBNER J.

Supreme Court, U.S.
FILED
JUN 27 1991
OFFICE OF THE CLERK

(2)

NO. 90-1842

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

COMMONWEALTH OF PENNSYLVANIA, Petitioner

v.

MEREDITH PENN, Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

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EDITOR'S NOTE:

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STATEMENT OF THE CASE

The Superior Court of Pennsylvania held that the trial court in this matter had violated respondent's sixth amendment right to an open public trial and prejudiced respondent by excluding spectators during a portion of his trial.

Respondent, Meredith Penn, surrendered himself to detectives at the Police Administration Building in Philadelphia, Pennsylvania, on August 6, 1984, charged with the shooting death of his common-law wife, Justine Davis, the mother of their two and one half year old son. The jury found the respondent guilty of murder in the first degree and possession of an instrument of crime on September 11, 1986. Post-trial motions were filed, which were denied on November 26, 1986. Sentencing was held on January 28, 1987, at which time he

was sentenced to life imprisonment and 2 1/2 to 5 years concurrent.

In February, 1987, respondent obtained new counsel to file Motion to reconsider and vacate denial of motion for new trial and to reconsider, modify and/or vacate sentence, which was denied by the trial judge without a hearing, and to file an appeal to the Pennsylvania Superior Court (hereinafter referred to as appellate court).

Upon the appellate court's ruling and decision on July 7, 1989, to remand for a new trial, the appellant sought panel reconsideration or en banc reargument of the appellate court's ruling. The appellate court denied the appellant's application for reconsideration on August 31, 1989. Appellant's Petition for allowance of appeal to the Pennsylvania Supreme court was denied on February 25, 1991.

At his trial, respondent testified that he purchased a gun in 1983, for protection, after having been assaulted (N.T. 9/10/86 pp. 177-180) and that he kept the gun in his car, when he traveled to and from his home, because he had been threatened by Gregory, a friend of his wife's, and some of Gregory's friends in July, 1984 (N.T. 9/10/86 pp. 182, 170-171). Respondent further testified that his wife deserted him and their son, while they slept, two weeks before the incident, and that on August 4, 1984, he had gone to talk with her about why she left and about her helping him care for their son, so he could continue working (N.T. 9/10/86 pp. 182-190, 202-207). Respondent testified that he and his wife were in his car and that he was trying to get Ms. Davis' hand off the gun and his hand, when the gun "went off" (N.T. 9/10/86 pp. 215)

suddenly and accidently.

Theodore Reed, a co-worker of respondent's at LaSalle University Security Department was called as appellant's witness. The appellant told the court that Mr. Reed was present to testify the morning of September 10, 1986, that he didn't want to testify, because he was respondent's friend, that he didn't like what he was doing, that he left, and that the appellant wanted a bench warrant to bring him back to testify (N.T. 9/10/86 pp. 71-74).

After the lunch break, Mr. Reed reappeared before the trial court, at which time the bench warrant was withdrawn, and the appellant told the trial court about the alleged threats against Mr. Reed and his family (N.T. 9/10/86 pp. 88-90). Mr. Reed did not testify or explain the circumstances himself or verify the appellant's

statements to the trial court. The trial court never examined Mr. Reed concerning the statements made by appellant concerning the alleged threats. The Court denied respondent's objection and motion for mistrial and cleared the court room (N.T. 9/10/86 pp. 93-96). There was no basis for the closure of the courtroom other than the unverified, unfounded, and vague, hearsay statements of the appellant. The trial court did not request that Mr. Reed attempt to identify those persons who allegedly threatened him, as defense counsel suggested (N.T. 9/10/86 pp. 92-93). The trial court admitted that respondent had the right to an open trial, pursuant to the sixth amendment, that the right is not absolute, that circumstances in which a witness was threatened may be a justification to limit 6th amendment rights, and that the

trial court could not determine whether there was an actual threat or by whom the threat was made (N.T. 9/10/86 pp. 91-95). Respondent raised this issue in post-trial motions and on appeal to the appellate court.

The appellate court, applying federal constitutional law, granted respondent a new trial. The opinion spoke at length on the need to respond effectively to witness intimidation, and held that clearing the courtroom of spectators may be appropriate under certain circumstances. However, the appellate court also held that the trial court had made "no findings" as to the "nature, extent, or impact" of the "alleged intimidation," and instead relied on "the prosecutor's second-hand, hearsay, rendition of the allegations" (Opinion, 11-12). The appellate court concluded that the burden placed on the

right to an open trial by clearing the courtroom for the testimony of one witness invariably required, "at a minimum" (emphasis in original) that the trial court hold an in camera hearing to determine if the threat "in fact exists" (Id. 12-13).

The appellate court set forth that the trial court had not made any findings or considered and/or assessed the circumstances surrounding the appellant's request for exclusion, as had been done by the court pursuant to prior opinions of the appellate court, the Pennsylvania Superior Court en banc, and the Pennsylvania Supreme Court, including, but not limited to, Douglas v. Wainwright, 739 F.2d 531, (11th Cir. 1984), cert denied, 469 U.S. 1208, 105 S.Ct. 1170 (1985), Waller v. Georgia, 467 US 39, 104 S.Ct. 2210 (1984), Commonwealth v. Contakos, 499 Pa 349,

453 A.2d 578 (1982), Commonwealth v. Wright, 255 Pa. Super. 512, 388 A2d 1084 (1978) (en banc), Commonwealth v. Knight, 469 Pa 57, 364 A.2d 902 (1976), Commonwealth v. Stevens, 237 Pa. Super. 457, 352 A2d 509 (1975) (en banc). The appellate court also set forth that the in camera hearing was one of the ways in which the findings could be made or circumstances surrounding the request for exclusion could be considered or assessed, and the cases that give authority for this.

Because the decision of the appellate court does not conflict with applicable decisions of the Court, the appellant's petition for writ of certiorari to the Superior court of Pennsylvania should be denied.

SUMMARY OF ARGUMENT

In the event of a closure of court proceedings, Waller v. Georgia sets forth certain criteria to be considered and applied by the trial court prior to the closure being permitted by the trial court. The right of the accused to an open and public trial is a constitutional right that is guaranteed, unless there is an overriding or higher conflicting interest that can only be protected by closure. These interests must be weighed against each other.

Holding an evidentiary hearing to weigh and consider these interests prior to closure has long been recommended by the courts as the better method to accomplish this and to convey the reasons justifying closure on the record.

In the event of a partial closure, courts have exercised a standard of whether there is a substantial reason for the partial closure rather than the overriding interest test.

Although the closure in the instant matter is a total closure, and although no showing of prejudice or harm is required, when a violation of the right to a public trial is asserted, the petitioner is requesting that this court apply the standard of substantial reason, rule that the witness was automatically entitled to testify in a closed courtroom, and in the event the closure is found to be in error, determine whether the error was harmless.

Since the trial court in the instant matter neglected to determine whether there was an overriding interest that necessitated total closure, to

limit the scope of said closure to be no broader than necessary, to consider reasonable alternatives to closure to make findings on the record adequate to support closure, and permitted total closure of respondent's jury trial during the testimony of a prosecution witness, the said closure was an error and violated the respondent's sixth amendment rights. The remand for new trial ordered by the appellate court should therefore be affirmed and permitted, and the petitioner's petition for a writ of certiorari must be denied.

REASONS FOR DENYING THE WRIT

THE SIXTH AMENDMENT RIGHT TO A PUBLIC TRIAL IS DENIED WHEN A COURT ROOM IS TOTALLY CLEARED OF SPECTATORS FOR THE TESTIMONY OF A WITNESS, PURSUANT TO WALLER V. GEORGIA, AND PREJUDICE IS IMPLIED, WHEN THIS CONSTITUTIONAL SAFEGUARD IS INHIBITED, DAMAGED, OR DESTROYED.

In Waller v. Georgia, a new trial was not ordered, because the defendant had been afforded an open public trial. Only the suppression hearing had been closed. The Court required a new suppression hearing, and held that if the material suppressed at the new suppression hearing was not suppressed at the prior closed suppression hearing, then the defendant would have a right to a new trial. The Court also held that the trial court should have considered alternatives to the closure and made findings adequate to support limiting the defendant's right to an open public hearing with the closure.

Waller sets forth tests which must be considered and met, when a closure is considered: a) the party seeking the closure must set forth an overriding interest that is likely to be prejudiced; b) the closure must be no broader than necessary to protect that interest; c) trial court must consider reasonable alternatives to closing the hearing; d) trial court must make findings adequate to support the closure. It was determined that the trial court in Waller did not consider alternatives to closure, that the reasons and interests proffered by the party seeking the closure were not specific enough to be considered an overriding interest, and that the trial court's findings were broad, general, and didn't purport to justify closure. Therefore, the closure was held to be unjustified and in error.

The petitioner proffers the theory that the decision in Waller limits the trial court's power to maintain order, protect witnesses, ensure a fair trial and to expedite litigation. That is simply not the issue in Waller nor is it the issue in the instant matter. The trial court certainly must maintain order in the courtroom and ensure a fair and public trial, all without violating the rights of the accused. In the instant matter, there was no specific or present or direct evidence of any intimidation or harassment, attempted or actual, within the courtroom, no evidence that any of the persons in the courtroom disrupted or attempted to disrupt the proceedings or obstructing justice in any way, and no evidence that there was disorder within the courtroom.

The cases of Illinois v. Allen, 397 U.S. 337 (1970) and Sheppard v. Maxwell,

384 U.S. 333 (1966), cited by petitioner, do not address the issue of closure of court proceedings. The closure in United States ex rel. Bruno v. Herold, 408 F.2d 125 (2nd Cir. 1969), cert. denied, 397 U.S. 957 (1970), was a partial closure, after the trial court actually observed behavior by certain spectators that appeared to intimidate the witness and thereby, to obstruct the proceedings. There was a partial closure during the first day of the trial and none during the second day. Under the circumstances, it was held that a sixth amendment situation was not reached.

The court has held that although the trial court has the power to exclude the public, when there is a demonstrated need to protect witnesses from threatened harassment or physical harm, that power should be sparingly exercised

and limited to circumstances where such an action is deemed necessary to ensure the administration of justice, and if the trial court excludes the public improperly, prejudice is implied and it is not required that a showing of harm from exclusion be made, United States v. Hernandez, 608 F.2d 741 (9th Cir. 1979), Davis v. United States, 247 F. 394 (8th Cir. 1917); Tanksley v. United States, 145 F2d 58 (9th Cir. 1944); United States v. Kobli, 172 F. 2d 919 (3rd Cir. 1949); United States v. Eisner, 533 F.2d 987 (6th Cir.), cert. denied, 429 U.S. 919 (1976); People v. Venters, 124 A.D. 2d 57, 511 N.Y.S. 2d 283 (1987), United States ex rel. Lloyd v. Vincent, 520 F.2d 1272 (2nd Cir. 1975), cert. denied, 423 U.S. 937., 96 S. Ct. 296, 46 LEd 2d 269 (1975). In Hernandez, and in Eisner, the court stated that the better course would have been for the trial

court to hold an evidentiary hearing rather than merely accepting the affidavit of one prosecution about another prosecution witness (in Hernandez) or basing its ruling on its belief that the witness was afraid, although it was unable to say whether the fear was real or imagined (in Eisner).

The court has set forth that the trial record must establish a real danger to the witness or a reasonableness of the witness' fears or a demonstration of the witness' inability to testify publicly, and that the witness is not arbitrarily and/or automatically entitled to testify with the public excluded, U.S. ex rel. Smallwood v. LaValle, 377 F. Supp. 1148 (E.D.N.Y.) aff'd, 508 F.2d 837 (2nd Cir. 1974) cert. denied, 421 U.S. 920 (1975). Although exclusions in emergency

situations, or when the proceedings are being influenced or impeded, are permitted, a sweeping and unlimited order clearing the court raises the issue of denial of sixth amendment rights, People v. Venters, 124 A.D. 2d 57, 511 N.Y.S.2d 283 (1987), State v. Callahan, 100 Minn. 63, 110 N.W. 342 (1907), Kobli, Davis. The court in Davis found it was a violation of the sixth amendment to exclude all persons except relatives of the defendant, members of the bar, and the media. The court in Venters found it was a violation of the sixth amendment to lock the courtroom doors during the charge to the jury. Intoxication of witnesses (in Davis) and possible distraction of jurors (in Venters) were not adequate reasons for closure.

The court in Eisner applied a standard of abuse of discretion to

determine whether the record was sufficient to support the trial court's finding that the witness was afraid and that grounds existed to exclude the public. The court balanced the interests of protection of the identities and lives of the undercover agents and informants against those of the defendants in Vincent and U.S. ex rel. Latimore v. Sielaff, 561 F.2d 691 (7th Cir. 1977), and found that those interests were sufficient to warrant closure.

Waller was the basis for the decision in Venters. In State v. Klem, 438 N.W. 2d 798 (N.D. 1989), the court used the Waller test of overriding interests that can and need to be protected by closure and found that mere assertions of counsel were an insufficient basis for justification of closure. Both Venters and Klem concern

full closures as does Waller. When less than a full closure of the proceedings was involved, a different standard than that used in Waller was applied in Nieto v. Sullivan, 879 F.2d 743 (10th Cir. 1989). An evidentiary hearing was held to determine whether there was a substantial reason for a partial closure of the proceedings due to the witness' fear of testifying before the defendant's relatives. The court determined that since the closure was limited to the defendant's relatives, then the closure was partial and that the witness' fear was a substantial reason for a partial closure.

The Waller criteria was applied to the exclusion of disinterested parties from the testimony of juvenile witnesses during a rape trial in United States ex rel. Morgan v. Lane, 705 F. Supp. 410 (N.D. Ill. 1989). The Waller criteria

was distinguished in United States v. Sherlock, 865 F.2d 1069 (9th Cir. 1989). It was found that Sherlock concerned exclusion of only defendant's family and that this was not a true closure. The court weighed the defendant's rights against whether there was a substantial reason for closure and considered whether the closure was narrowly limited in scope to exclude the public only to the extent necessary to satisfy the purpose for which it was ordered. The spectators that were excluded were observed making faces and laughing at the witness during the witness' testimony. Even under those circumstances the court felt that the closure should have been the last alternative and "that the better course would have been for the judge first to issue appropriate admonitions as to improper courtroom behavior and then to

exclude spectators who failed to observe his request after holding an evidentiary hearing," Sherlock at 1078.

The closure in State v. Robillard, 146 Vt. 623, 508 A2d 709 (1986) was deemed to be partial, since the public has access to the courtroom during the recesses, but it was still maintained that the trial court must consider other reasonable alternatives to closure and place findings of fact on the record. In People v. Harris, 60 A.D. 2d 636, 400 N.Y.S. 2d 184 (1977), cert. denied, 439 U.S. 846 (1978), the closure was also deemed partial, since only two spectators were excluded. A conference was held in chambers, but the grounds supporting exclusion were not placed on the record, so the exclusion was an error.

In Douglas v. Wainwright, the Court held that a court must hold a hearing

and articulate specific findings before ordering either a total or partial closure, in addition to determining "substantial reason" for partial closing.

The closure in Douglas v. Wainwright was not a total closure as in Waller. The media, family members of defendant, witnesses and the decedent were all permitted to remain in the courtroom, as well as parties, lawyers, and court personnel. The court relied upon Aaron v. Capps, 507 F.2d 685 (5th Cir. 1975) and applied the standard of whether there was a substantial reason for the closure and whether those reasons were weighed against the defendant's rights. A hearing and adequate findings concerning the issues and circumstances surrounding the closure was deemed necessary by the Douglas panel, as in Waller. The

instant matter concerns a total closure of the proceedings, and therefore, concerns the right to a public trial guaranteed by the sixth amendment. In view of this, the criteria of Waller should have been followed and/or applied.

No showing of prejudice to the accused is required, when a violation of the accused's right to a public trial is asserted, Commonwealth v. Knight.

When exclusion is permitted, the court has held that prejudice is implied, Sielaff, and that exclusion is equal to denying the defendant's presumption of innocence, Tanksley, because it would be difficult to show any definite personal injury as a result of the closure and would necessarily damage or negate the guarantee of the safeguard, Hernandez. A reviewing court should not be permitted to consider

whether there was harmless error, especially in circumstances in which there was a total exclusion of the public, as in Waller and in the instant matter. Although the courts in Robillard and Hargrove determined that the defendants in those cases were not prejudiced by the exclusions, the exclusions were not total exclusions and such a determination was improper.

The trial court in the instant matter did not make any findings and was admittedly not clear as to the basis for the closure order. The appellate court in the instant matter noted that alternatives to closure should have been considered (Opinion pp. 13-14) and that closure should have been the "last option considered or employed," supra.

The appellate court specifically states in its opinion that this was a narrow decision held in the instant case

and that the findings required to justify a closure of the court were not made. The appellate court was merely setting forth the minimum requirements for due process and a constitutional, fair, open, public trial, and requiring the basic preservation of the respondent's rights. An in camera hearing was a suggestion of a step to be taken to determine the necessity or justification for closure as opposed to the sixth amendment rights of the respondent.

The appellate court in the instant matter, applied the same legal standards that were applied in Waller v. Georgia, Douglas v. Wainwright, Commonwealth v. Knight.

The appellant has stated throughout these proceedings that there was no factual dispute about the threats against Mr. Reed. There are no facts at

all, only the appellant's version of Mr. Reed's statements. No one knows if any portion of that version contained misstatements. No one knows if Mr. Reed knew who threatened him or not. There was no confirmation from Mr. Reed, himself, that he had been threatened and that because of these threats, he was afraid to testify. There was no evidence that Mr. Reed had been threatened within the courtroom. The trial court never asked Mr. Reed to confirm what the appellant stated.

It is not disputed that the trial court has the power to counter disruptive or threatening behavior in the courtroom. However, when a partial or total , especially total, closure of the public is requested, the sixth amendment rights of the other party are in danger of being prejudiced or inhibited or damaged or voided.

If the trial court has the power to clear the court room, it certainly has the power to hold an in camera hearing to inquire into facts or circumstances. The trial court should certainly have given as much weight to the clearing of the courtroom and denying or limiting the defendant's sixth amendment rights as it gave to unsubstantiated claims of intimidation. It would follow that if there are claims of intimidation, the trial court has the power to determine the true circumstances of those claims and whether those circumstances justify closure of the trial.

Since the trial court in the instant matter neglected to determine whether there was an overriding interest that necessitated total closure, to limit the scope of said closure to be no broader than necessary, to consider reasonable alternatives to closure to

make findings on the record adequate to support closure, and permitted total closure of respondent's jury trial during the testimony of a prosecution witness, the said closure was an error and violated the respondent's sixth amendment rights. The remand for new trial ordered by the appellate court should therefore be affirmed and permitted, and the petitioner's petition for a writ of certiorari must be denied.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the petitioner's petition for a writ of certiorari to review the decision of the appellate court be denied.

Respectfully submitted,

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(3)

NO. 90-1842

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IN THE
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OCTOBER TERM, 1990

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Petitioner

v.

MEREDITH PENN,
Respondent

REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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ARGUMENT

1. THAT THE CIRCUIT COURTS PERCEIVE A NEED TO INVENT A "PARTIAL CLOSURE"/ "SUBSTANTIAL REASON" TEST TO SUPPLEMENT WALLER SHOWS THAT THIS ISSUE SHOULD BE REVISITED.

Respondent claims that Pennsylvania "is requesting that this court apply the standard of substantial reason" invented by certain federal appeals courts (Brief in Opposition, 10). On the contrary, while

Pennsylvania would undoubtedly benefit from such an application, that has never been petitioner's position. Rather, the point is that the "partial closure"/"substantial reason" test is an essentially unworkable accommodation to sixth amendment concerns that are outside the scope of Waller v. Georgia, 467 U.S. 39 (1984). The very fact that several circuits have embraced such an ad hoc standard of review clearly demonstrates that the public trial right of criminal defendants requires explication beyond Waller, which is the sole case on this issue in this Court's history.

The "partial closure"/"substantial reason" standard evolved because, as occurred in this case and in Douglas v. Wainwright, 739 F.2d 531 (11th Cir. 1984), cert. denied, 469 U.S. 1208 (1985), trial judges have reacted decisively to thwart witness intimidation intended to distort testimony, and have not convened formal

hearings to determine facts not in dispute. Where (to borrow respondent's phrase) a court acts to exclude spectators "when the proceedings are being influenced" (Brief in Opposition, 18), a sixth amendment situation "is not reached." United States ex rel. Bruno v. Herold, 408 F.2d 125, 127 (2d Cir. 1969) (emphasis added), cert. denied, 397 U.S. 957 (1970).

As respondent's own brief demonstrates, the partial/total closure expedient analysis of the federal appeals courts is unworkable. Waller is referred to as a "total" closure, yet only the suppression hearing was closed in that case. Respondent refers to Douglas as a "partial" closure, yet the terms of the exclusion order in Douglas are indistinguishable from that in this case, which respondent deems a "total" exclusion.[1] Similarly, respondent

---

[1]The trial court in Douglas allowed designated persons to remain, as did the (continued...)

denounces People v. Venters, 124 A.D.2d 57, 511 N.Y.S.2d 283 (1987), as a "sweeping and unlimited" exclusion of the public (Brief in Opposition, 18-20), where the trial court merely locked the courtroom doors during its charge to the jury. Compare State v. Robillard, 146 Vt. 623, 508 A.2d 709 (1986) (locking courtroom doors harmless error because spectators could enter and exit during recesses).

The "partial closure"/"substantial reason" test is an expedient. It was created because in-court witness intimidation in conjunction with the public trial right is a gray area which Waller did not directly address. It should be addressed now.

---

[1](...continued)
trial court here, although respondent in fact refused to designate anyone (N.T. 9/10/86, 94).

2. CONTRARY TO RESPONDENT'S ASSERTION, THERE WAS NO FACTUAL DISPUTE WHATEVER THAT THE WITNESS WAS THREATENED.

Respondent additionally labors to insinuate that a factual dispute existed on this issue at trial. This position is simply an invention. At trial, defendant's counsel completely accepted the facts as conveyed by the prosecutor (N.T. 9/10/86, 92-93). Respondent never even asked that the witness be examined on this question.

Respondent's effort to raise a nunc pro tunc factual dispute neatly points out the irrationality of barring a harmless error analysis in every such claim. Convening a hearing to "determine" facts not in dispute would have been pointless, yet the Pennsylvania Superior Court seemed to regard this as the very essence of the trial court's alleged error.[2] That

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[2]While additionally referring to the trial court's supposed failure to consider alternatives, the Superior Court could (continued...)

prejudice must be "presumed" from error which consists of failing to do a pointless act, suggests that the harmless error doctrine should be reconsidered in the instant context.

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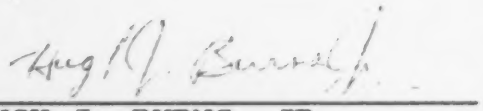
[2](...continued)
suggest no realistic alternative to be considered.

CONCLUSION

For the foregoing reason, petitioner respectfully requests that a writ of certiorari issue.

Respectfully submitted,



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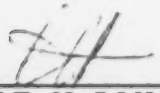

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